IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 308 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AJIT BHACHU JOGI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 308 of 2002

MR CH VORA for Petitioner No. 1-3

MR PR ABICHANDANI, APP, for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 23/10/2002

ORAL JUDGEMENT

1. This revision application arises out of judgment and order rendered by learned Sessions Judge, Kutch, at Bhuj, on the 26th July, 2002, in Criminal Appeal No.14 of 2000, confirming conviction of the revisioners recorded

by learned Extra Assistant Sessions Judge, Bhuj, vide judgment and order dated the 20th June, 2000, in Sessions Case No.83 of 1995, under Sections 498-A and 306 read with Section 114 of Indian Penal Code. The learned Extra Assistant Sessions Judge, after recording conviction, sentenced the revisioners to undergo rigorous imprisonment for a period of two years for offence punishable under Section 498-A and to pay a fine of Rs.200/-, in default, to undergo further imprisonment for 15 days. The learned Extra Assistant Sessions Judge also sentenced the revisoners to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.500/-, in default, to undergo further imprisonment for a period of two months. The learned Sessions Judge, in appeal, confirmed the conviction and sentence and, therefore, this revision application by the accused-convicts.

2. The facts of the case, in brief, are that, revisioner No.1 was married to one Shambai, daughter of Kanji Abha Jogi. During the wedlock, she had delivered a son, who was about 11 months old, at the time of the incident. As per the prosecution case, she was meted out with physical and mental cruelty off and on. It is the case of the prosecution that she had a relationship of sisterhood with a Mohammadan boy-Ali Mohmad Malek, who used to visit her place off and on. It transpires from the prosecution case that Ali Mohmad Malek and sister-in-law of Shambai (husband's sister), Jaya, cultivated soft corner for each other which, ultimately, resulted into a love affair and about 15 days prior to the incident, they had eloped and got maried. This elopement caused a turmoil in the family and it is the case of the prosecution that the revisioners subjected the deceased-Shambai to physical and mental torture to such an extent that she committed suicide on the 27th July, 1995, at about 5.00 P.M., at village Sukhpar, in her residence. It is the case of the prosecution that Shambai was held responsible for the entire episode and was meted out with physical and mental cruelty. A complaint came to be lodged by Shantaben, mother of deceased-Shambai. On basis of the complaint, an offence was registered and was investigated. Upon investigation, it was found by the investigating agency that there was evidence to connect the revisioners with the offence and, therefore, a charge sheet was filed. As the offences were triable by a Court of Sessions, the case was committed to the Court of Sessions and Sessions Case No.8 of 1995 came to be registered.

2.1 Charge was framed against the revisioners, to which they pleaded not guilty, and the learned Extra

Assistant Sessions Judge, therefore, after considering the evidence led by the prosecution, recorded the conviction and awarded the sentence, as stated above. The said judgment and order was challenged in appeal before the learned Sessions Judge, who dismissed the appeal.

3. Learned Advocate, Mr. Vora, submitted that, though the scope of revision is very limited, here is a case where the revisioners would pray for examining the record to ascertain whether there is evidence to constitute the offences for which the revisioners have been convicted. According to Mr. Vora, there is not an iota of evidence to constitute the offence punishable under Section 498-A or 306 of I.P.C. and, therefore, the conviction could not have been recorded.

3.1 The record and proceedings are before the Court. Learned Advocate, Mr. Vora, has taken this Court through the record and proceedings and he submitted that the two material witnesses-Umar Kanji and Babi Mithu, brother and sister, respectively, of the deceased are material witnesses. He submitted that the evidence is too vague and general. No specific role is attributed to any of the revisioners. He submitted that mere allegation of ill-treatment or harassment to the deceased is considered to be not sufficient to constitute the offence punishable under Section 306 of I.P.C., in light of Section 107 of I.P.C., as held by the Apex Court. He has drawn attention of this Court to the judgment of the Apex Court in Sanju alias Sanjay Singh Sengar v. State of M.P. (2002) 5 SCC 371. Mr. Vora submitted that there is total lack of evidence to indicate the intention. There is nothing to show that the harassment was meted out with an intention of abetting commission of suicide.

3.2 So far as applicability of Section 113-A of the Evidence Act is concerned, Mr. Vora submitted that the eivdence, if perused, would indicate that, according to brother of the deceased (Umar Kanji), the marriage took place about 10 years prior to the incident whereas, according to Babiben, it was about 7 years prior to the incident and, therefore, Section 113-A of the Evidence Act could not have been made use of. Mr. Vora, therefore, urged that this revision application may be allowed.

4. Learned Additional Public Prosecutor, Mr. Abichandani, has opposed this revision application. He has drawn attention of this Court to the deposition of Babiben (Ex.18), where she has stated that the deceased

told her that responsibility of elopement of her sister-in-law is fastened on her and the in-laws will not permit her to live and within days, thereafter, the incident has occurred. Mr. Abichandani, therefore, submitted that the necessary inference has to be drawn that it was the harassment meted out by the revisioners that persuaded or led the deceased to commit suicide. Mr. Abichandani, therefore, submitted that the revision application may be dismissed.

5. Having regard to rival side contentions, it has to be stated, at the outset, that, in this revision, this Court is not expected to enter into the realm of re-appreciation of the evidence. But the Court certainly would be required to examine the evidence to appreciate the contentions raised before this Court by Mr. Vora that there is total lack of evidence to indicate that an offence under Section 306 or 498-A of I.P.C. is constituted.

6. The Apex Court, in the case of Mahendra Singh v. State of M.P., 1995 SCC (Cri) 1157, considered the following dying declaration :-

> "My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed, I want to die by burning."

The Apex Court, considering the definition of 'abetment' under Section 107 of I.P.C., found that the charge of conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment of the deceased. The Apex Court held that neither of the ingredients of abetment are attracted on the statement of the deceased.

7. In Sanju alias Sanjay Singh Sengar v. State of M.P. (supra), the Apex Court also observed that "the word 'instigate' denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. Presence of mens rea, therefore, is the necessary concomitant of instigation. It is common knowledge that the words uttered in a quarrel or on the spur of the moment cannot be taken to be uttered with mens rea. It is in a fit of anger and emotion." Section 306 of I.P.C. runs as under:-

"306. Abetment of suicide:- If any person commits suicide, whoever abets the commission of suicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

It is, therefore, clear that abetment of commission of suicide is held to be punishable. It will have to be, therefore, examined what is meant by abetment. Word "abetment" is defined under Section 107 of I.P.C., as under :-

"107. Abetment of a thing :- A person abets the doing of a thing, who -

Firstly.- Instigates any person to do that thing; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.- A person who, by wilful misrepresentatiion, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing."

8. The complainant-Shantaben, mother of the deceased, has not been examined by the prosecution.

9. Umar Kanji is examined at Ex.17. He happens to be the brother of the deceased-Shambai. He says that he does not exactly remember as to how many years prior to the incident his sister was married to revisioner No.1. He says that, after the marriage, whenever Shambai came to her parental house, she used to say that her husband, mother-in-law and Bhachu Samat were causing harassment to her for household work. She said that her sister-in-law had eloped with a Muslim boy and that they used to say that his sister is responsible for the same. He says that Ajitbhai and his mother used to beat Shambhai. According to him, the reason for his sister committing suicide was the harassment meted out to her by her husband, mother-in-law and Bhachu Samat and suspecting

his sister in the elopement of her sister-in-law.

9.1 Ignoring the cross-examination, even if the examination-in-chief is given a close scrutiny, it does not reveal the ingredients of abetment. There is not a word to say that the harassment was with an intention of inciting or instigating the deceased to commit suicide. There is not even a whisper about presence of mens rea in the alleged conduct of the revisioners.

10. Babiben, wife of Mithu Pardhi, who happens to be sister of the deceased, is examined at Ex.18. According to her, the marriage of the deceased with revisioner No.1 took place about 7 years prior to the incident. She says that, whenever Shambai came to her parental house after the marriage, she used to say that the accused persons are giving taunts and are causing harassment. She used to say that her husband beats her. She says that they used to sood and explain to the deceased that the relationship is interwoven and, therefore, it would not be proper if such matters leak out. She says that her sister had told her that the harassment is continuing and that her sister-in-law had eloped with a Muslim boy. Revisioner No.1 had come to collect the photograph of that boy and that Shambai has a hand in the elopement. Later on, the witness says that, she was told by Shambai that she is accused of the responsibility for the elopement and that they would not permit her to live. In about eight days' time thereafter, Shambai committed suicide.

10.1 Here also ignoring the cross-examination, even if the examination-in-chief is taken at its face value, it does not reflect any mens rea or instigation or incitement with mens rea for constituting the offence punishable under Section 306 of the Indian Penal Code, as interpreted by the Apex Court in the case of Sanju alias Sanjay Singh Sengar v. State of M.P. and Mahendra Singh v. State of M.P. Barring these two pieces of evidence, there is no other evidence led by the prosecution for establishing the charges against the revisioners. Therefore, there is substance in the contention of Mr. Vora that there is no evidence to indicate constitution of the offence punishable under Section 306 of I.P.C.

11. Considering the question whether offence under Section 498-A can be said to be constituted, a reference needs to be given to the decision of this Court in Indrasing M. Raol v. State of Gujarat, wherein it was observed that, to prove a case under Section 498-A, the prosecution has to establish that cruelty and harassment

was incessant, persistent and unbearable. It was also held that it must be established that cruelty and harassment was with the intention to force the woman to commit suicide or to fulfil unlawful demand for property, etc. In the instant case before this Court, as discussed above, there is not even a whisper of about intention for causing alleged cruelty or harassment, leave aside the intention to force the woman to commit suicide or to fulfil unlawful demand for the property and, therefore, for constituting the offence under Section 498-A also, there is total lack of evidence in the present case. The Courts below, therefore, could not have recorded a confirmed the convictions under Sections 306 and 498-A of I.P.C.

12. It would also be appropriate to note, at this stage, that despite a close scrutiny, this Court was at loss to find out the exact nature of cruelty or harassment caused to the deceased or the exact role of any of the revisioners. No specific allegation is made and no evidence is led in this regard.

13. It also cannot be overlooked that the tenor of evidence indicates that the initial disputes, quarrels or taunting and harassment were on routine household work matters and, even as per the prosecution witnesses, it was not to be of a serious nature as, according to them, they themselves said that it is an internal family matter and it should not leak out. The deceased was also asked to go back to her matrimonial house. If the situation was serious, this probably would not have happened. The situation seems to have taken a serious turn after the elopement of the girl with a Muslim boy. Even the deceased felt that she would be fastened with the responsibility when she learnt about the incident and it has come on record that she was fastened with the responsibility. The situation has to be considered thus. That the Muslim boy was permitted entry to the matrimonial house of the deceased because there was a brother-sister relationship between the deceased and the Muslim boy and that, ultimately, ended up into development of a love affair between the sister-in-law of the deceased and the boy. Obviously, the family must be on a turmoil and the deceased may have been said to be responsible for the episode of elopement. There is absolutely no evidence as to what was the degree of heat put on to her. But, in this regard, observations of the Apex Court in case Sanju alias Sanjay Singh Sengar (supra) and Ramesh Kumar v. State of Chattisgarh, (2001) 9 SCC 618 may also be considered. The Apex Court had observed :-

"A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged for abetting the offence of suicide should be found guilty."

14. Taking the totality of materials on record as also the facts and circumstances of the case, it has to be held that the conviction cannot be permitted to stand. The revision deserves acceptance as the convictions are recorded in absence of material necessary to constitute the offences for which the convictions are recorded and, therefore, the revision is accepted. The judgments and orders of the Courts below, i.e. the judgment and order dated the 26th July, 2002 of the learned Sessions Judge, Kutch, at Bhuj, in Criminal Appeal No.14 of 2000 and the judgment and order dated the 19th June, 2000, passed by the learned Extra Assistant Sessions Judge, Bhuj, in Sessions Case No.83 of 1995, are hereby set aside. The revisioners should be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded.

15. Direct service is permitted.

[A.L. DAVE, J.]

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